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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 690

ROBERT H. MARTIN,

Petitioner,

v.

PHILLIPS PETROLEUM COMPANY, ET AL,

Respondents.

RESPONDENT PHILLIPS PETROLEUM COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In The

Supreme Court of the United States

October Term, 1966

No. 690

Robert H. Martin,

Petitioner,

v.

Phillips Petroleum Company, et al,

Respondents.

RESPONDENT PHILLIPS PETROLEUM COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner's pleading and proof, including his own deposition, viewed in the light most favorable to him, establish that his total complaint is that the Respondent Phillips,* rather than Petitioner Martin, became the owner of an approximate 50% residual net profit interest in, and operator of the Locust Ridge gasoline plant, and that the other Respondents combined with and aided the Respondent Phillips in bringing about this result. Because this does not constitute a violation of any of the federal antitrust laws and because it affirmatively appeared that Petitioner had not been "injured in his business or property" as required by Section 4 of the Clayton Act, Respondents moved early in the cause to dismiss for failure to state a claim upon which relief could be granted. (R. 78.) In denying the motion

* The parties will be referred to in the same abbreviated form used in the Petition.

Judge Hutcheson significantly noted that "in my own view, the allegations of the complaint make out very little more than a case of common law interference with contractual relations * * *" but stated that decision of the question "should be made as the issues clarify themselves through the development of the evidence." (R. 124.)

The Petitioner thereafter ranged far and wide through the fields of discovery with some 35 separate depositions in New York, Shreveport, Bartlesville, Dallas, and Houston, totaling 8,162 transcribed pages of deposition testimony and thousands of pages of documents and exhibits. In addition hundreds of pages of answers to interrogatories were supplied by Respondents to Petitioner.* On the basis of this voluminous and exhaustive record the District Court granted Respondents' motions for summary judgment, confirming Judge Hutcheson's sage, and by then two-year-old, forecast as follows:

> "After the most extensive discovery touching every phase of this controversy, this record falls far short of showing a cause of action for violation of the antitrust laws. * * *" (R. 959.)

The Court of Appeals affirmed the summary judgment in favor of Respondents on the ground that Petitioner, who under the undisputed evidence: (i) had never owned or operated a natural gasoline plant; (ii) required 100% financing to acquire the gasoline plant covered by his suboption; (iii) had no contract for the financing of such acquisition; (iv) failed to satisfy substantial conditions precedent to the financing and to the acquisition; and (v) held only an oral extension of an expired suboption which was void under applicable Louisiana law was not "injured in

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* All of this material is included in the record on appeal, but only a small part of it has been printed.

his business or property" when certain Respondents, with financing by Respondent Chemical Bank, acquired the gasoline plant and attendant facilities which Petitioner had previously made an unsuccessful attempt to acquire in conjunction with Respondent Texas San Juan Oil Company with financing by Respondent Chemical Bank.

The Court of Appeals capsuled Petitioners' case, indulging every reasonable inference from the material undisputed facts in his favor, as follows:

> "The essence of the case is that Mr. Martin was a finder; he sought to promote his find through bank financing, and was unsuccessful. The Bank decided not to make the loan. It is true that the Bank, in a sense gave Mr. Martin's find to Phillips. The remedy for this occurence, if any, is not a suit under the anti-trust laws."

QUESTIONS PRESENTED

(1) The first two questions presented in the Petition for Writ of Certiorari, if accurately stated in the context of the case, would be combined as follows:

> Whether Petitioner, who under the undisputed evidence had never owned or operated a natural gasoline plant, required 100% financing to acquire the gasoline plant covered by his sub-option, had no contract for the financing of such acquisition, failed to satisfy substantial conditions precedent to the financing and to the acquisition, and held only an oral extension of an expired suboption which was void under applicable Louisiana law was "injured in his business or property" when certain Respondents acquired the gasoline plant and attendant facilities with financing by Respondent Chemical Bank which Petitioner had previously made an unsuccessful attempt to finance through Respondent

Chemical Bank and to acquire in conjunction with Respondent Texas San Juan.

(2) The third, fourth, fifth, and sixth questions presented by the Petitioner, if accurately stated in the context of this case, would be combined as follows:

> Whether a commercial combination between Respondent non-competitors under which certain Respondents acquired a gasoline plant and its attendant facilities with financing by Respondent Chemical Bank which Petitioner had theretofore unsuccessfully sought to acquire with attempted but unconsummated financing through Respondent Chemical Bank constituted a violation of Sections 1 or 2 of the Sheman Act (15 U.S.C. § 1) or Section 7 of the Clayton Act (15 U.S.C. § 18).

(3) The seventh question presented in the Petition, if accurately stated in the context of this case, would be as follows:

> Whether the Trial Court abused its discretion in limiting discovery in certain instances when Petitioner took more than 8000 pages of deposition testimony from 35 witnesses in four states, and received thousands of pages of documents from Respondents and hundreds of pages of interrogatory answers from Respondents.

STATEMENT OF THE CASE

Petitioner's Statement of the Case does not present with accuracy, brevity, and clearness that which is essential to a ready and adequate understanding of the points requiring consideration as required by Rule 23, paragraph 4, and is not free from burdensome, irrelevent, immaterial, and scandalous matter as required by Rule 40 of the Rules

of this Honorable Court. Both the opinion of the Court of Appeals and the opinion of the District Court contain a full statement of all of the material facts developed during extensive discovery in terms most favorable to the Petitioner. To the extent that Petitioner's Statement of the Case departs from the statements of the undisputed facts as contained in these opinions, the departures are either exaggerations, or misstatements of the record. Many are purely inflammatory and have no real bearing on the case. Some of the more pertinent misstatements of the record will be dealt with under specific points in the argument in this brief.

REASONS WHY THE WRIT SHOULD BE DENIED

The petition for writ of certiorari should be denied for each and all of the following reasons:

(1) The Court of Appeals correctly held that under the undisputed evidence, viewed in the light most favorable to Petitioner, it appears as a matter of law that Petitioner has not been "injured in his business or property" as required by Section 4 of the Clayton Act.

(2) The judgment of the Trial Court and the judgment of the Court of Appeals are correct and sustainable on still other grounds.

(3) The decision under review is not in conflict with any prior decisions of this Court or of any of the other Courts of Appeals. Decisions of other Courts of Appeals on the same point upon which the decision under review was based have been denied review by this Court.

SUMMARY OF THE ARGUMENT

I. Petitioner, who had never been engaged in the business of owning or operating a gasoline plant and who lacked the preparedness and capacity to enter that business, was not "injured in his business" when Respondents acquired the property which Petitioner had hoped to obtain. Petitioner was not "injured in his property" because he had no valid property rights which were affected.

II. The decisions of the courts below should be sustained on the additional ground, not reached by the Court of Appeals, that under the undisputed facts Petitioner does not make out an antitrust case but at most shows an ordinary commercial association aimed at helping Respondent Phillips compete with Petitioner Martin for the operation of and 50% residual ownership interest in a small gasoline plant with Phillips and the Respondents associated with it emerging as the successful competitors.

III. The Trial Court did not abuse its discretion but ruled correctly on certain matters which resulted in minor curtailments of Petitioner's exhaustive and massive discovery undertakings inasmuch as (i) Petitioner did not employ the proper procedures and (ii) similar discovery had been denied to Respondents.

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEALS THAT PETITIONER WAS NOT "INJURED IN HIS BUSINESS OR PROPERTY" IS CORRECT.

The Court of Appeals and the District Court found and the Petitioner testified that he had never had any connection or experience with either the ownership or the opera-

tion of a gasoline plant, i.e., he was not in and had never been in the gasoline plant business (R. 1220). The Court of Appeals and the District Court found and the undisputed evidence establishes that the Petitioner Martin required 100% financing to exercise the Jett suboption by paying $2,000,000 for the acquisition of the Locust Ridge gasoline plant and its attendant facilities, i.e., in order to get into the gasoline plant business (R. 1220). Petitioner concedes that Respondent Phillips had rejected a 1960 offer to sell this plant to it for $2,000,000 because the plant was overpriced. (Pet. for Cert., p. 11), and that the only likely prospect for 100% financing of the plant acquisition at that figure was the Respondent Chemical Bank because the tax loss carry forward controlled by it "was in fact the key to the acquisition of the Locust Ridge properties" (Pet. for Cert., p. 36). The Court of Appeals and the District Court found and the undisputed evidence establishes that Petitioner Martin never did consummate a contract with Respondent Chemical Bank for the financing and that, on the contrary, the Bank decided not to make the loan for the acquisition of the properties on the basis proposed by Petitioner.

On these ultimate facts the Court of Appeals correctly held that Petitioner Martin's unsuccessful attempt to get into the gasoline plant business through promoting the Respondent Chemical Bank to finance the Respondent Texas San Juan Oil Company in the acquisition of the Locust Ridge Plant did not constitute either "business or property" under Section 4 of the Clayton Act. This decision is not in conflict with but is consistent with prior decisions of this Court and of the Courts of Appeals.

In *Buckeye Powder Co.* v. *DuPont Powder Co.*, 248 U.S. 55 (1918), this Court laid the basis for the rule applicable here that nebulous and uncertain ventures do not constitute

the "business or property" necessary to support a treble damage action. In that case a former employee chartered a corporation to compete with DuPont Company when it was "at the height of its power" and then brought a treble damage action alleging that the defendant's monopoly power caused its failure. This Court held that the plaintiff "knew all the elements of the situation before he embarked on the venture" and hence "did not stand like a competitor that had been in existence while the defendant's influence was being developed and that had been injured in its business during the course of such development — that the mere existence of defendant's power as it was when the plaintiff was born was not in itself a cause of action to the plaintiff." As Mr. Justice Holmes stated it:

> "The plaintiff could not be called into being in order to maintain a suit for conduct that made it not pay to be born." 248 U.S. at 64.

One commentator has appraised the effect of *Buckeye* as follows:

> "Mindful of *Buckeye's* warning, the courts have often relied upon factors that led to the conclusion that the venture itself was nebulous. The crucial elements are an intent to enter business plus *substantial preparedness* to do so." 64 Columbia Law Review, 570, 577.

The decision of the Court of Appeals in this case is entirely consistent with and supported by the decisions of the other Courts of Appeals which have uniformly held that a mere purpose and mere attempt to promote a venture into a going business will not suffice to establish "injury" to "business" under the statute, even though the attempt may have been thwarted by the defendants. *Triangle Conduit & Cable Co.* v. *National Electrical Products Corp.*, 152 F. 2d 398 (3d Cir. 1945); *Lawlor* v. *National Screen Service Corp.*, 270 F. 2d 146 (3d Cir. 1959), *cert. denied*, 362 U.S.

922 (1960); *Duff* v. *Kansas City Star Co.*, 299 F. 2d 320 (8th Cir. 1962), where the plaintiff who had formerly been a newspaper publisher prepared to resume publication by renting an office, arranging for printing, and making an extensive survey of the advertising and newspaper markets; *Peller* v. *International Boxing Club, Inc.*, 227 F. 2d 593 (7th Cir. 1955), where the plaintiff was attempting to enter the professional boxing promotion business and had negotiated and reached terms with two fighters, received assurances of a site for the bout and of financial support, but had no signed contracts; and *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F. 2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963), where a manufacturer of roofing materials intended to go into the new line of manufacturing asphalt shingles and roll roofing but had not purchased machinery to do so and in which the court stated:

> "Preparedness and capacity to engage in a business mean more than an intention to do so and an ability to buy the necessary facilities."

In none of these analogous cases has this Court seen any necessity for review.

The factors determinative of whether a plaintiff has been "injured in his business" under the statute have been stated to be as follows:

> "(1) The background and experience of plaintiff in his prospective business;
>
> "(2) affirmative action on the part of plaintiff to engage in the proposed business;
>
> "(3) The ability of plaintiff to finance the business and the purchase of facilities and equipment necessary to engage in the business; and

"(4) consummation of contracts by plaintiff."

Timberlake, *Federal Treble Damage Antitrust Actions*, (1965), p. 23. Under the undisputed evidence Petitioner Martin fails to come within at least three of these four factors.

Under the undisputed evidence, Petitioner Martin not only had no contract for the financing of the plant acquisition with the Respondent Chemical Bank or with anyone else; had not only failed to comply with essential conditions precedent to any such contract, e.g., the subordination of the Jett interest and the furnishing of reserve reports on *new gas* showing total reserves sufficient to support a plant with a *daily throughput* of 40 million cubic feet per day upon which the proposed financing had always been predicated (R. 1222, 1228, 1392); but also had no valid, enforceable suboption for the acquisition of the Locust Ridge Plant since the written suboption had expired by its terms and the oral extension thereof was void under applicable Louisiana law. Accordingly, Petitioner Martin sustained no injury to "property" within the meaning of Section 4. The most that the Petitioner Martin had in his negotiations with Chemical Bank and under his oral suboption from Jett was a promising business relationship. The most that the undisputed evidence, viewed in the light most favorable to the Petitioner Martin, would establish is "an interference with prospective economic advantage" which does not constitute "injury to property" because "mere expectations and hopes are not the type of legal interests protected by Section 4." 64 Col. L. Rev. 570, 580. Negotiations that do not ripen into a contract do not constitute "property" under Section 4. *Peller* v. *International Boxing Club, Inc.*, 227 F. 2d 593 (7th Cir. 1955); *Harrison* v. *Paramount Pictures, Inc.*, 115 F. Supp. 312 (E.D. Pa. 1953), aff'd, 211 F. 2d 405 (3d Cir.), *cert. denied*, 348 U.S. 828 (1954); and *Melrose*

Realty Co. v. *Loew's, Inc.*, 234 F. 2d 518 (3d Cir.), *cert. denied*, 352 U.S. 890 (1956).

The reasonable expectation which Petitioner Martin may have had that Jett would honor his oral suboption did not constitute "property" under Section 4. Louisiana law and Petitioner's own admissions make it clear that the "oral suboption" did not give him any legal rights. Article 2440 of the Louisiana Civil Code declares such an oral contract to "be null, as well as for third persons as for the contracting parties themselves, and the testimonial proof of it shall not be admitted." This Court in *Keogh* v. *Chicago & Northwestern Railway Company*, 260 U.S. 156, 163, (1922), discussing injury to business or property under the statute, squarely held that:

"Injury implies violation of a legal right."

Petitioner Martin had no "legal right" in the oral suboption and hence no "property". The Louisiana statute and the case of *Hoth* v. *Schmidt*, 220 La. 249, 56 So. 2d 412 (1951), were presented to the district court in Respondents' brief in support of the motion to dismiss. Petitioner suggests that the state law is not applicable in this treble damage action and complains about the Court of Appeals' opinion placing "strong emphasis" on state law — "law fashioned for purposes unrelated to the antitrust laws." It is clear that state law determines whether the oral suboption was enforceable or a nullity and then federal antitrust law is looked to for determining whether there was injury to business or property. The recent decision of this Court in *Wallis* v. *Pan American Petroleum Corporation*, 384 U.S. 63 (1966), held that the Louisiana statute of frauds here involved is valid, applicable, and controlling as applied to assignments of federal oil and gas leases despite the contention that some kind of federal common law should be evolved instead.

THE COURT DID NOT ASSUME ANY MATERIAL CONTROVERTED FACTS

At pages 20 and 21 of his brief Petitioner alleges that the Court of Appeals made eight assumptions of controverted facts in arriving at its conclusion that Martin was not injured in his business or property. Viewing the opinion as a whole, these criticisms seem carping and not dispositive of the case even if Petitioner's contentions were correct. But as the following seriatim treatment of these eight assertions from the Petition will show, Petitioner's complaints are entirely unfounded.

> "(1) Martin's exercise of his suboption from Jett 'was conditioned on the ability to expand the plant to a processing capacity of 40,000 Mcf of gas per day' [Appendix A, p. 10];"

It is clear from the terms of Martin's suboption quoted at page 22 of Petitioner's brief that Martin would have been obligated to expand the capacity of the plant to 40,000 Mcf of gas per day as soon as Jett had performed his obligations under the contract. The Court did not state that expansion of the plant was a condition precedent to exercise of the suboption as Martin seems to argue. Clearly, Martin would have had to expand the plant had he exercised the option and had Jett performed his obligations under it. Prudent exercise of the option was therefore conditioned on the ability profitably to expand the plant in compliance with the commitment, and this is the gist of the Court's statement:

> "(2) that the reserves made it 'impossible' to expand the plant to a 40,000 Mcfd *capacity* [Appendix A, p. 10]; (3) that (i) 'a favorable reserve report by DeLaat' and (ii) a subordination by Jett of 'his net profits interest to the loan payments' were each

'a condition precedent to any financing' by Bank [Appendix A, pp. 4, 11];"

By these points (2) and (3), Petitioner seeks to imply that the only real matter of concern to the parties was having a plant of a *capacity* of 40,000 Mcf of gas per day even if the gas reserves would not supply the gas to be put through such plant. He ignores the economic presentation which had been made to the Bank and caused it to be interested (R. 1392), and he ignores the fact that mere existence of plant capacity does not provide income to repay investments. It is undisputed that the Bank's consideration of a loan was premised on DeLaat's reporting of reserves to support a throughput of 40,000 Mcfd of gas (R. 1222, 1392, Martin Deposition Exhibits DM 1A and DM 17).

"(4) that Bank had the right to give Phillips Martin's deal [Appendix A, pp. 5, 11];"

The court did not so hold, but merely stated that if this had been done by the Bank, it did not constitute a breach of the antitrust laws.

"(5) that Martin was not able to operate a gasoline plant [Appendix A, p. 9];"

Again, Petitioner is misquoting the Court of Appeals. The exact finding is ". . . we find that the Appellant by his own admission had no experience in the operation of a gas plant". Martin himself has so testified (R. 1220; Martin Deposition 79-80).

"(6) that Martin 'did not have the ability to finance the business' [Appendix A, p. 9];"

The finding attacked is that Martin "did not have the ability to finance the business, but was hoping to obtain

100% financing from the Bank." Petitioner's argument seems to be that Martin *did have* the ability to finance the acquisition because he ought to have been able to get the 100% financing from the Bank. This bootstrap rejoinder hardly establishes that the Court's finding was unfounded.

"(7) that 'Martin was a finder' [Appendix A, p. 11], which status the Court obviously concluded did not constitute 'property';"

The use of the term "finder" is clearly a convenience of expression. The essence of this observation is that mere proof that one who has spotted a business opportunity but is unable to conclude it on the terms he desires because of failure to obtain financing does not have property. This is a correct conclusion of law.

"(8) that the law of Louisiana prevented Martin's option from being valid [Appendix A, pp. 9, 11]."

As already demonstrated, under Louisiana law Martin's orally extended option was a nullity not only as to the parties but third persons as well. The statement of the Court of Appeals is entirely correct.

If in any sense Martin's orally extended suboption from Jett expiring on January 16, 1961, could be considered to be property, Martin was not injured in such property, for by Martin's own admission Mr. Jett, after the conclusion of the alleged conspiratorial acts and after Martin had voluntarily withdrawn from participation with the Respondents, extended Martin's sub-option to January 25, 1961.* Thus Martin wound up with a longer option period than he possessed at the time this Respondent first had any connection with the matter on January 12, 1961.

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* (R. 571. Item 41 of First Amended Complaint)

NO CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS ON MEANING OF "BUSINESS OR PROPERTY"

The decision of the Court of Appeals on "business or property" is consistent with the other Courts of Appeals decisions claimed by Petitioner Martin to be conflicting. In *Vines* v. *General Outdoor Advertising Co.*, 171 F. 2d 487 (2d Cir. 1948), the plaintiff had been in business as an advertising solicitor for seven years under contracts with the defendant. The defendant, pursuant to a contract with a competing advertising agency held to be violative of the antitrust laws, withdrew a customer which plaintiff had been soliciting and assigned such customer to the competing advertising agency. In *North Texas Producers Ass'n* v. *Young*, 308 F. 2d 235 (5th Cir. 1962), *cert. denied*, 372 U.S. 929 (1963), the plaintiff was not only engaged in business as a Kansas milk distributor who proposed to extend his business into the Dallas, Texas, territory, but the plaintiff had a valid contract with the milk producers' association for a supply of milk which the competing milk distributors induced the producers' association to breach. In *Jerrold Electronics Corp.* v. *Wescoast Broadcasting Co.*, 341 F. 2d 653 (9th Cir.), *cert. denied*, 382 U.S. 817 (1965), the issue of whether the plaintiff had "business or property" was neither discussed nor decided. However, the opinion discloses that the plaintiff's majority stockholder had an operating community antenna television business in an adjoining area, that he chartered the plaintiff corporation to enter a like business in the area in question, that the new corporation solicited and signed up subscribers to its service, and that it placed orders with the defendant manufacturer for necessary equipment for the community antenna television system which were accepted by the defendant manufacturer. Defendant manufacturer thereafter un-

dermined, aborted, and averted performance under the purchase orders in conspiracy with plaintiff's competitor. The existence of both "business" and "property" in each of the three cases is readily apparent.

II.

THE JUDGMENT OF THE COURT OF APPEALS IS SUSTAINABLE ON THE FURTHER GROUND THAT THE PLEADINGS AND THE PROOF VIEWED IN THE LIGHT MOST FAVORABLE TO THE PETITIONER ESTABLISH AS A MATTER OF LAW THAT THIS IS NOT AN ANTITRUST CASE.

The only question reached and decided by the Court of Appeals was whether or not Petitioner had been "injured in his business or property." But even if Petitioner Martin had been so injured, the judgment of the Court of Appeals is correct because the pleadings and the undisputed facts, including every inference therefrom most favorable to the Petitioner, establish at the most an ordinary commercial venture by non-competitors to acquire a small natural gasoline plant with its gas gathering and pipeline facilities with the Respondent Phillips instead of the Petitioner Martin as plant operator and owner of a 50% residual interest. The Respondent Chemical Bank, which had made no binding or firm commitment to finance the acquisition of the Locust Ridge properties, decided that in order to make a sound loan it would be necessary to condition any such financing on Respondent Phillips participating as operator, marketer of plant liquids, and owner of a 50% residual interest, with Petitioner Martin's hoped-for interest to be reduced from a 43¾% residual interest to approximately 20%. Petitioner withdrew his oral suboption on the properties from further negotiations on January 16, 1961,

and sought to finance the acquisition elsewhere (R. 1147-52, 1155-59). Under a further oral extension of his suboption to January 25, 1961, Petitioner Martin thereafter sought to finance the acquisition of the properties from several other sources. When he was unsuccessful, and when the properties were thereafter acquired by Respondents, Petitioner brought this lawsuit. The district court found that "this record falls far short of showing a cause of action for violation of the antitrust laws" and the court of appeals similarly found "the remedy for this occurrence, if any, is not a suit under the antitrust laws". These holdings are not in conflict with but are supported by prior decisions of this Court and of the other Courts of Appeals.

In *Apex Hosiery Co.* v. *Leader* 310 U.S. 469 (1940), it was established that not every combination is within the scope of the Sherman Act but that its ambit is limited to combinations between competitors to fix prices or other terms and conditions of sale, to divide business, to allocate markets, or otherwise to limit or to eliminate competition between them; to combinations between sellers and buyers or sellers or buyers to refuse to buy from or to sell to competitors or to deal with others except on certain conditions; to combinations between manufacturers or other competitors to limit or otherwise restrict production of any commodity; and to other like combinations restraining free competition in the production, transportation, sale, or purchase of commodities in interstate commerce.

The Sherman Act does not bring within its scope a combination of non-competitors aimed at helping one member of the combine get a business deal that a non-member is also after. Under Petitioner's own theory, that is the most we have here. The pleading and the proof construed in the light most favorable to the Petitioner and every arguable inference therefrom raise at the most an issue of the exist-

ence of a combination between the Respondents to help the Respondent Phillips compete with Martin for the operation of and a 50% residual interest in the Locust Ridge gasoline plant and its attendant facilities. The Petitioner's theory boiled down to its essence is that the Respondents are liable in treble damages because Respondent Phillips competed successfully. As Judge Learned Hand put it in *United States* v. *Aluminum Company of America*, 148 F. 2d 416, 430 (2d Cir. 1945):

> "The successful competitor, having been urged to compete, must not be turned upon when he wins."

Again in *Hunt* v. *Crumboch*, 325 U.S. 821 (1945), it was held that a conspiracy between a labor union and its adherents to boycott the plaintiff's business not for business or labor purposes but out of malice and revenge did not constitute an antitrust conspiracy. In affirming the dismissal of the case, this Court said with reference to the Sherman Act:

> "That act does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce."

While there is absolutely no evidence in this case of fraudulent, unethical, or improper conduct on the part of Respondents, the cases establish that even that kind of conduct by a combination which seeks to get a business deal for a defendant which the plaintiff is also after does not bring such a combination within the purview and application of the federal antitrust laws.

A recent decision which squarely supports the summary judgment in Respondents' favor in this case is *Ace Beer Distributors Inc.* v. *Kohn, Inc.*, 318 F. 2d 283 (6th Cir.), *cert. denied*, 375 U.S. 922 (1963). In that case the defendant

Stroh Brewing Company was alleged to have conspired with the defendant Kohn, Inc., to cancel plaintiff Ace Beer Distributors, Inc., beer distribution franchise without prior notice and simultaneously to issue a new beer distribution franchise in the same territory to the defendant Kohn, Inc. It was charged that a part of the conspiracy was that Kohn, Inc., would secretly make preparations to make immediate entry into the beer distribution business in the two counties contained in the plaintiff's territory and secretly to lure two of plaintiff's key employees and nearly all of plaintiff's truck drivers into Kohn's employment immediately upon the cancellation of the plaintiff's franchise. It was charged that defendants knew that under such circumstances plaintiff would be unable to continue its business and that plaintiff's business as a beer distributor in interstate commerce would be and was substantially destroyed. It was held that the conspiracy charged was not the kind of combination that constituted a violation of the Sherman Act. The Court of Appeals stated in part:

> "In considering the issue in this case, it must be kept in mind that plaintiff is not seeking a recovery for an alleged breach of contract or damages based on any common law action for tortious interference with contract rights or for unfair competition or for any common law tort. Whether a right of damages exists in some other action based on breach of contract or tort, is not before us in this case. Whether a cause of action exists under the antitrust laws is the sole issue in this case. In that connection it is well settled that tortious conduct against one engaged in interstate commerce or which has an effect on interstate commerce does not automatically constitute a violation of the Sherman Act. Apex Hosiery Co. v. Leader, 310 U.S. 469, 60 S. Ct. 982, 84 L. Ed. 1311; Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464; Hunt v. Crumboch, 325 U.S. 821, 65 S. Ct. 1545, 89 L. Ed. 1954."

Another particularly persuasive decision is *Parmelee Transportation Co.* v. *Keeshin*, 292 F. 2d 794 (7th Cir.), *cert. denied*, 368 U.S. 944 (1961), in which Keeshin was alleged to have conspired with a corporate defendant controlled by him and with a member of the Interstate Commerce Commission for the latter to use the influence of his official position to induce the railroad companies to award an exclusive contract for transfer service between terminals of the railroad companies to Keeshin's corporation instead of to plaintiff who had had this contract for many years. In return, the member of the Interstate Commerce Commission was to receive an executive position in the company and certain other emoluments from Keeshin. The combination was successful and Keeshin's company obtained the contract which otherwise appeared to be headed in the direction of Parmelee. The district court at the conclusion of the plaintiff's evidence dismissed the case, holding that the conspiracy was not an antitrust conspiracy and saying:

> "This case does not belong in the family of antitrust cases under any conditions from the entire record before me."

The Circuit Court of Appeals affirmed the trial court, saying:

> "An assertion that the competitive market for this contract was destroyed or that the competition for it was eliminated is belied by the record. While one competitor succeeded and necessarily the other failed, unmistakably there was very strenuous competition. This unavoidable fact undermines the plaintiff's charges under §§ 1 and 2 of the Sherman Act. Nor is this result precluded by the fact (which a court might well find on the case presented by way of offers of proof) that the victory of the successful bidder was made easier by the wrongful conduct of a public official. Assuming

the record represented as to his involvment reflects the truth (which we are for this purpose required to do), any party damaged thereby has (and would have had, even before the enactment of the Sherman Act) a ground for relief in the courts of this country. *However, the use of conventional antitrust language in drafting a complaint will not extend the reach of the Sherman Act to wrongs not germane to that act, even though such wrongs be actionable under state law. We are not concerned with labels. Otherwise, an adroit antitrust lawyer might use his skill in the use of words to convert many unlawful acts into antitrust violations. The antitrust laws were never meant to be a panacea for all wrongs.*" 292 F. 2d at 804 (Emphasis ours.)

The *Parmelee* case is a firm holding that a commercial combination to compete with another and to take a business deal away from another even through unethical or improper business conduct does not constitute a conspiracy in restraint of trade violative of the Sherman antitrust law even though interstate commerce is affected and even though the plaintiff competitor is injured.

The *Parmelee* decision was followed in *Norville* v. *Globe Oil & Refining Co.*, 303 F. 2d 281 (7th Cir. 1962), which held that a combination between a gasoline supplier and a filling station lessor, under which the lessor obtained the benefit of overcharges made by the supplier of gasoline sold to the plaintiff lessee, did not fall within the purview of the federal antitrust laws. The court said in part:

"Aside from the use of conventional antitrust language in describing the share of defendant Terzaikis in the transaction as a rebate, the claims advanced by plaintiff amount to over-reaching, imposition, and fraud in a business transaction. All this occurred in the State of Illinois, of which all the parties are citizens. Even if the products involved might have been in interstate commerce, the wrongs alleged are actionable under the

law of Illinois, which has jurisdiction over all the parties." 303 F. 2d at 282.

The Court in conclusion added:

> "It is, of course, immaterial that the appeal of treble damages and attorney's fees afforded by federal law may be more attractive than the simple compensatory damages available under state law." 303 F. 2d at 282.

The total — the ultimate — of Petitioner Martin's case, liberally viewed in the light most generous to him, is that Respondent Chemical Bank and Respondent Phillips, joined by other respondents, combined to take the contemplated Locust Ridge gasoline plant deal away from Petitioner and to acquire the plant and its attendant facilities with Respondent Phillips instead of the Petitioner as the operator and with Respondent Phillips instead of the Petitioner as the owner of the 50% residual interest and thereby placing Respondent Phillips in the position previously contemplated and intended for Petitioner Martin in the negotiations between the Respondent Chemical Bank and the Petitioner. The cases seem to establish beyond any doubt that this poses no antitrust issue — that this presents no combination or conspiracy violative of the Sherman Antitrust Act. If there is any actionable wrong involved, it is not remediable in an antitrust treble damage cause of action as the Petitioner evidently realized or suspected when he filed a common-law tort action in the state court shortly after Respondents answered his original Complaint in this case. The District Court opinion concluded that Petitioner,

> "with appetite whetted by visions of treble damages * * * has pursued this antitrust phantom, rather than the more substantial common law claim for interference with contractual negotiations. Counsel advise that such an action, filed contemporaneously with this, is pending in the state court. Plaintiff should look there for relief."

The claimed conflict between other Courts of Appeals decisions cited by Petitioner and this decision seems to be predicated entirely upon the fact that the cited cases held that the Sherman Act had been violated while this case held that it had not. The cited cases range all the way from common price fixing conspiracies to classic group boycotts with none of them bearing the remotest resemblance to the case at bar. For example, *United States* v. *First National Bank and Trust Co.*, 376 U.S. 665 (1964), involved the combination by merger of two banks which were substantial competitors. *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960), involved a price fixing agreement and *Associated Press* v. *United States*, 326 U.S. 1 (1944), involved a combination between competitors to boycott other competitors. *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), was a classic group boycott in which the members of the New York Stock Exchange expressly agreed that they would not furnish the plaintiff leased wire services. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), was another classic group boycott where the competitor defendants expressly agreed that they would not sell appliances to Klor's. There was no agreement in the instant case, either express or implied, that anyone would refuse to sell to or buy from anybody. All of the other claimed conflicting decisions cited by Petitioner are equally remote and inapplicable.

NO UNLAWFUL TYING ARRANGEMENT

Petitioner argues that because the Bank set certain prerequisites for the financing of the Locust Ridge proposition these prerequisites must be considered as tied to the loan and therefore the Bank engaged in tying conduct in violation of Section I of the Sherman Act. Such argument will not bear analysis. The cases cited by Petitioner as conflicting with the decision of the Court below in failing to

find an unlawful tying arrangement as a matter of law, show that even if, as Petitioner contends, a loan of money by a Bank could be a "tying product",* and even if the services of Phillips as operator of the gasoline plant as a condition to making the loan could be a "tied product", there could be no tying arrangement which would violate Section 1 of the Sherman Act. Petitioner's quotation from *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1 (1958), states the requisites of unlawful tying arrangements. Such arrangements are unlawful "whenever a party has sufficient economic power with respect to the tying product appreciably to restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected." Petitioner does not state what "commerce" has been affected. Of course, Petitioner is referring to an effect on commerce in LPG products from the plant. Petitioner's problem is that this is not the tied product about which he complains. Petitioner makes no claim that a not insubstantial amount of interstate commerce in services of Phillips as operator of the Locust Ridge Plant or any other similar properties has been affected, for to do so would be patently absurd.

As to the tying product, the credit of the Bank, it is clear that it was within the power of the Bank to grant or withhold such credit at will. Petitioner concedes that the Bank did not have monopoly power over credit generally. In fact, after Petitioner withdrew from any further negotiations with the Bank and other Respondents, Petitioner was free to and did seek financing elsewhere.

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* A loan of money in fact is *not* the sale or lease of a commodity as requisite for a tying arrangement under the antitrust laws. *United States* v. *Investors Diversified Services, Inc.*, 102 F. Supp. 645 (D. Minn. 1951); *Columbia Broadcasting System, Inc.* v. *Amana Refrigeration Inc.*, 295 F. 2d 375 (7th Cir. 1961), cert. denied, 369 U.S. 812 (1962).

The requirement by the Bank that an experienced operator and marketer of the Locust Ridge Properties be obtained was proper, legitimate, and reasonable. It is obvious that the antitrust laws never contemplated that the conditions attached by a bank or any other lending institution to the lending of money or the extension of credit should be deemed an unlawful tying arrangement. The Bank was considering making a loan of $2,000,000. The money was to be repaid out of funds obtained from the operation of the Locust Ridge Plant. Therefore, the Bank had every proper, reasonable, and legitimate right to strengthen its security by insuring that there was a substantial and experienced operator of the properties and an assured market for the products of the plant. A law which would characterize the prerequisites that a lender sets for making a loan in a given situation as unlawful "tying" would be the most pernicious imaginable.

NO ATTEMPT OR CONSPIRACY TO MONOPOLIZE

Petitioner also asserts that the decision of the Court of Appeals is in conflict with decisions relating to attempts or conspiracies to monopolize in violation of Section 2 of the Sherman Act. But the elimination of the Petitioner as a would-be competitor in the Locust Ridge Market was not the result of an exercise of monopoly power by Phillips or the Bank or both of them combined. The undisputed facts are stated in the opinion of the trial court. Phillips was and is a minor factor in LPG Sales in the relevant market area selected by Petitioner. Even with the addition of the supply of liquids from the Locust Ridge plant, only 560 barrels per day, Phillips controlled only in the neighborhood of ten to fifteen percent of the market in that area. There are six or seven companies in the market which are larger marketers. The undisputed evidence is that

the market position of Phillips in this area had steadily declined in 1960 and 1961 until the local office of Phillips in Shreveport was closed because it was no longer economically justified. (R. 1085-1101). The uncontroverted evidence before the trial court showed that the average daily production of LPG Products from the Locust Ridge plant is less than 1% of the total production from similar plants in Louisiana. The total LPG products from the three plants controlled by Phillips in Louisiana amounted to 124,000 gallons per day including the Locust Ridge plant. There are fourteen other companies producing more LPG products per day in Louisiana plants than Phillips. One such company, the Union Texas Petroleum Company, produces almost ten times as much LPG as Phillips in Louisiana. (R. 583-605). Phillips has no natural gasoline plant at all in Mississippi. This evidence, which is from a 1963 survey of United States gas processing plants appearing in the *Oil & Gas Journal* and Bureau of Mines Information Circular 8006, entitled, Natural-Gasoline Plants In The United States, January 1, 1960, (R. 583-626) is uncontroverted and establishes as a matter of law that there is no monopoly, conspiracy to monopolize, or attempted monopoly in this case. Under this evidence, Phillips has neither the power to control market prices for LPG products in the market area nor to exclude competition therefrom.

The theory of attempt or conspiracy to monopolize urged by Petitioner is that in frustrating Petitioner's expectations and desires of becoming operator of the Locust Ridge plant and the owner of a 50% residual interest therein, Respondents excluded him from competition in the market area. Using this theory, in any competitive situation where two parties are competing for the same deal, the one who is successful in obtaining it and thereby excludes the competition of the other from that particular operation becomes a

monopolist as to that operation. This is the inevitable consequence of the competitive free enterprise system. There is a vast difference between competing successfully for a deal and the power to exclude another from the market. Monopolistic power is not merely to prevail in one competitive struggle but to deny to would-be competitors the opportunity to compete.

The decision of the trial court, as affirmed by the Court of Appeals, is in accord with *McKay* v. *Columbia Broadcasting System*, 324 F. 2d 762 (2d Cir. 1963), in which Columbia Broadcasting System and others were sued for antitrust damages because of an alleged conspiracy to obtain the production of and to produce a television program on the life of Billie Holiday, a famous jazz singer, which plaintiff also had been planning and seeking to do. It was alleged that the Defendants by such acts monopolized the production of this program and excluded the competition of the plaintiff. In affirming dismissal of this count of the suit, the Court of Appeals said:

> "Count I of the amended complaint attempts to state a Sherman Act claim by alleging a combination and conspiracy among CBS, four of its employees, and the New York State Department of Education to 'procure, monopolize, and keep within the control of the defendants . . . the production of a television program about Billie Holiday.'
>
> *"But simply characterizing the above facts by liberal use of antitrust terminology will not create a Sherman Act claim. Under the plaintiff's theory, which strikes us as nothing short of preposterous, anyone who claimed to be considering a future television program or movie about a particular person would have a claim against any producer of a program on the same subject under the Sherman Act for monopolization and suppression of competition in that subject.* We agree with Judge Levit that the amended com-

plaint does not set forth facts under which relief can be granted under the Sherman Act." 324 F. 2d at 763. (Emphasis supplied).

The decisions of the Courts below are also in accord with that in *American Football League* v. *National Football League*, 323 F. 2d 124 (4th Cir. 1963). In holding the fact that defendants held eleven of the most desirable locations out of thirty-one American cities suitable for professional football franchises did not constitute monopoly, conspiracy to monopolize, or attempted monopoly, even though Plaintiffs were excluded from these cities, the Court of Appeals said:

> "It is not unlike the choice a chain store makes when it selects a particular corner lot as the location of a new store. It preempts that lot when it acquires it for that purpose but, as long as there are other desirable locations for similar stores in a much broader area, it cannot be said to have monopolized the area, or, in a legal sense the lot or its immediate vicinity." 323 F. 2d 130.

Other cases of similar import are *Wright & Associates, Inc.* v. *Ullrich*, 328 F. 2d 474 (8th Cir. 1964), and *Clark Marine Corp.* v. *Cargill, Inc.*, 226 Supp. 103 (D. La. 1964).

The minor and declining position of Phillips in the market area and the trivial effect which the natural gasoline and LPG products volume from the Locust Ridge Plant had thereon demonstrates that no dangerous probability of Phillips' achieving a monopoly resulted from the Locust Ridge operation and that a subjective intent on Phillips' part to achieve a monopoly thereby would be an absurdity.

The decisions of the Courts below are not in conflict with *Lessig* v. *Tidewater Oil Co.*, 327 F. 2d 459 (9th Cir. 1964),

cert. denied, 377 U.S. 993 (1964), nor with *National Wrestling Alliance* v. *Myers,* 325 F. 2d 768 (8th Cir. 1963). In *Lessig* the Court held that the probability of accomplishing a monopoly position and an investigation as to the power of the alleged monopolist in a relevant market were immaterial where the charge was only that an attempt to monopolize had been made and that the specific intent to monopolize existed. The Court simply held that the jury should have been allowed to determine whether or not Tidewater intended to fix the price at which "2,700 independent service station operators resold gasoline, and to exclude other suppliers of petroleum products and sponsored TBA items from competing for the patronage of these operators and took steps to accomplish that purpose", because based upon such findings, the jury could "properly conclude that Tidewater attempted to monopolize a part of interstate commerce . . . ." There is not one iota of evidence that Phillips alone or in combination with any other Respondents, sought to fix the price of any product or that Phillips alone or in combination with any other of the respondents sought to prevent an existing competitor from competing in any market.

In *Wrestling Alliance,* the Court was dealing with a proven boycott which in effect monopolized the wrestling exhibition business through combination or agreement between the allied and organized wrestling promotors which prevented the plaintiff from continuing in his existing business as a wrestling promotor and performer.

NO VIOLATION OF SECTION 7

Petitioner's procrustean effort continues with the assertion that the affirmance of the Court of Appeals of the trial court decision that Section 7 of the Clayton Act had

not been violated by the arrangements for the operation of the Locust Ridge plant by Phillips is in conflict with other decisions under Section 7. No such conflict exists because the undisputed facts show that even if the contractual arrangements between Phillips and other Respondents under which Phillips was to operate the plant properties and market the products thereof amount to an "acquisition" of assets, there was no potential lessening and no actual lessening of competition in the market area selected by Petitioner and, in fact, that competition was enhanced thereby. For the first time, Phillips was able to market LPG products in the Louisiana portion of the market area after the existing contract for the sale of LPG products had expired. Had Petitioner realized his hope of operating the Locust Ridge properties, he would have, by his own testimony, continued the existing contract with the Propane Corporation for the sale of plant products and there would have been no such addition of competition to the relevant market. (R. 1173, 1235). Propane Corporation has continued as a strong and vigorous competitor in the market. No competitor has been eliminated. It is also undisputed that there was vigorous competition in the relevant market before the "acquisition" and equally vigorous competition therein after the "acquisition". Phillips continued to decline in its position in the market and during this period at least two new competitors entered the field and increased their market percentages (R. 1098-1099).

Under circumstances such as those presented by this record, there is no cause of action under Section 7 of the Clayton Act for one standing in the position of Petitioner. No court has ever held, or even intimated, that a private individual with no existing business or property in any

way affected by an acquisition,* could recover treble damages as the result of a violation of Section 7, which requires as a quantum of proof a mere probable or potential anticompetitive effect.

III.

RESTRICTING PETITIONER'S ABUSE OF THE DISCOVERY PROCESS WAS NO ABUSE OF DISCRETION

Having been given free rein for more than two years to take more than 8000 pages of oral deposition testimony from more than 35 witnesses, including 10 employees of the Respondent Phillips, and having been permitted to obtain thousands of pages of documents and hundreds of pages of interrogatory answers from respondents, it is little short of astounding that Petitioner could now assert that he has been unduly restricted in his use of the discovery process. The District Court's opinion conservatively describes the discovery permitted Petitioner as "the most exhaustive discovery touching every phase of this controversy."

Some of the documents involved were the lawyer's notes of Respondent Phillips' tax attorney Baldwin taken in conference with McCullough and other employees of his client Phillips on January 13, 1961, and notes taken at the January 16, 1961, Adams Petroleum Center meeting in Houston in which they were in attendance. Another document involved is a memorandum which McCullough of

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* The property which Petitioner claims has been injured is his option on the Locust Ridge properties which, even if considered valid as orally extended, expired of its own terms on January 25, 1961, long before the contractual arrangements asserted to be an acquisition were consummated in the period March 27-29, 1961. Section 7 does not render unlawful negotiations antecedent to an acquisition.

Respondent Phillips wrote to his superior Keeler concerning the events at the Houston meeting of January 16, 1961, subsequent to the time that Petitioner Martin had withdrawn from the negotiations in hostility and at a time when this lawsuit was already imminent. The action of the trial court in quashing Petitioner's subpoena duces tecum for the production of these documents at the taking of the Baldwin deposition was patently correct for several reasons. First, the documents of a party must be obtained by a motion under Rule 34 with a showing of good cause and not by subpoena duces tecum under Rule 45 in connection with the taking of a deposition. Indeed Petitioner succeeded in quashing a subpoena duces tecum served upon him in connection with the taking of his oral deposition by Respondents on this very ground. (R. 307, 320). Second, the trial court also sustained Petitioner's objections and refused Respondents' motion to require the production of notes taken by the Petitioner's own lawyer, Ben H. Schleider, Jr., at the same January 16, 1961, Houston meeting and the narrative statements prepared by Petitioner Martin himself and by his associate Weiler concerning the very matters and transactions in suit. Having sucessfully resisted the production of his own notes and those of his associate and of his lawyer concerning these same meetings and these same matters, Petitioner is certainly in no position to complain about the refusal of the Court to compel the production of the identical type of notes and memoranda of Baldwin and McCullough concerning these same meetings and matters. (R. 474-488, 501-512, 535-538, 539-547, 557).

As to the other documents, a reference to the record shows that the trial court sustained the Respondent's objections for various reasons, all of which were valid. (R.

231-234, 253, 306). If Petitioner failed to obtain all of the documents to which he may have been entitled, this was due to his failure to pursue the proper procedures.

The courts have refused to disturb the exercise of the trial court's discretion in discovery matters comparable to this one. *Jones* v. *Metzger Dairies, Inc.*, 334 F. 2d 919 (5th Cir. 1964), *cert. denied*, 379 U.S. 965 (1965).

The recent case of *Waldron* v. *Cities Service Co.*, 361 F. 2d 671 (2d Cir., 1966), is quite comparable to the situation here. In affirming the summary judgment granted to the defendant in that treble damage action and in holding that the trial court did not abuse its discretion in denying further discovery, the Court of Appeals said in part:

> "* * * Despite these more than ample opportunities to develop a basis for his action, plaintiff has been unable to do so, and has failed to demonstrate the existence of any genuine issue of fact. The court quite properly denied the Rule 56(f) motion for further discovery by which plaintiff sought to engage in still another 'fishing expedition' in the hope that he could come up with some tenable cause of action.
>
> "We are not unmindful that private antitrust suits to some extent cast the plaintiff in the role of a 'private attorney general' and that such suits are favored. * * * Even so, it is apparent in this case that Waldron was given ample opportunity and scope in his shifting programs of discovery. The plaintiff, as a 'private attorney general' may not seek indefinitely, within the period of limitations, to use the process to find evidence in support of a mere 'hint' or 'suspicion' of a cause of action."

CONCLUSION

The reluctance of the courts to grant summary judgments in genuine antitrust cases, where the existence *vel*

son of a cause of action depends upon the resolution of material fact issues, does not obtain in actions based on claims which are beyond the scope and intendment of the antitrust laws, and which as a matter of law do not constitute the subject matter of an antitrust suit. *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464 (1962), relied upon by Petitioner, and cases following it, are of the former type. This case belongs to the latter classification. This Court has refused to disturb summary judgments for the defendants in antitrust treble damage actions in cases where it appeared as a matter of law that no such cause of action existed. *Poster Exchange, Inc.* v. *Paramount Film Distributing Corp.*, 340 F. 2d 320 (5th Cir.), *cert. denied*, 381 U.S. 936 (1965); *Jones* v. *Metzger Dairies, Inc.*, 334 F. 2d 919 (5th Cir. 1964), *cert. denied*, 379 U.S. 965 (1965). Summary judgments under such circumstances have been sustained by the Courts of Appeals in two recent treble damage cases. *Waldron* v. *Cities Service Co.*, 351 F. 2d 671 (2d Cir. 1966); and *Walker Disiributing Co., Inc.* v. *Lucky Lager Brewing Co.*, 362 F. 2d 1008 (9th Cir. 1966), application for cert. pending, Dkt. No. 626, October 4, 1966.

The present case may be neatly and accurately described by language from *Jones* v. *Metzger Dairies, Inc., supra*, as follows:

> "Our examination of the record and briefs, however, convinces us that the case was fairly and patiently considered by the Trial Court and that the correct result was reached. The learned and experienced Trial Court retained jurisdiction of the case for approximately three years, during which period of time there were conferences, pretrial procedures depositions, interrogatories, motions, answers, briefs, and other proceedings.

The docket entries alone require almost 19 pages of the record. We have found no error. The judgment is affirmed." 334 F. 2d at 926.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of this Brief of Respondent Phillips Petroleum Company in opposition to Petition for Certiorari have been mailed, properly stamped and addressed, to Mr. A. A. White, Mr. Ben H. Schleider, Jr., and Mr. Earl O. Lattimer, II, attorneys for record for the petitioner Robert H. Martin, at their addresses of record, this 12th day of November, 1966.

.....

Attorney for Respondent
Phillips Petroleum Company